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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Global Marine, Inc., Halliburton Services, Ingram Industries, Inc., Quality Shipyards, Inc., Reading & Bates Corporation, Tidewater, Inc. and Zapata Gulf Marine Corporation each have employees engaged in maritime employment on the navigable waters of the United States and adjoining piers, docks, structures or other areas customarily used in loading, unloading, repairing, or building vessels. These employers also own and operate vessels and floatable structures or platforms engaged in operations on inland navigable waters of the United States and on the high seas.

They are defendants in frequent and extensive litigation involving the determination of status questions under both the Jones Act and the Longshore and Harbor Workers' Compensation Act. This litigation largely consists of multiple inconsistent claims for which these employers must procure two entirely different types of insurance coverage. For that reason, these employers wish for the Court to have their views and reasons for reversal of the ruling

below which conflicts with the expressed Congressional intent underlying the Longshore Act, and will only serve to further muddy the waters in seaman status cases.

If the decision below is permitted to stand, seaman status questions will henceforth be absolutely unpredictable and uniformly unresolvable at the trial court level. The number of fact-based seaman status appeals will multiply exponentially, requiring case by case appellate determination by an already overburdened court system.

The purpose of this brief is to persuade the Court to reverse the Ninth Circuit decision and to adopt a seaman status rule similar to that in Pizzitolo in order to establish uniformity of decisions consistent with express statutory provision and legislative intent.

All parties to this action have consented in writing to the submission of this brief.

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SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in this case should be reversed because the opinion is contrary to the legislative development of the Longshore and Harbor Workers' Compensation Act[1] and the Jones Act[2] and directly contradicts United States Supreme Court precedents, including the recent unanimous decision in McDermott International, Inc. v. Wilander,[3] defining the term "seaman" and delineating the distinction between land-based maritime workers covered by the LHWCA and those relegated to Jones Act remedies. The decision below also conflicts with the body of jurisprudence denying seaman status, as a matter of law, to workers who have no permanent assignment to a vessel or fleet of vessels.[4]

1. 33 U.S.C. §§ 901-950 (1988), hereinafter "LHWCA" or "Longshore Act."
2. 46 U.S.C. § 688(a).
3. 111 S.Ct. 807 (1991), hereinafter "Wilander."
4. *See* Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 983 (5th Cir. 1987), cert. denied, 108 S.Ct. 1013 (1988), and its progeny, Williams v. Weber Management Services, Inc., 839 F.2d 1039 (5th Cir. 1987); Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991); and Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir. 1991).

This Court should adopt the rule enunciated in Pizzitolo v. Electro-Coal Transfer Corp.,[5] which is entirely consistent with this Court's unanimous decision in Wilander,[6] and restricts the definition of Jones Act seamen to "members of a crew of a vessel" in accordance with the expressed legislative intent of the LHWCA and the Jones Act. Such a seaman status rule, already developed and fine-tuned by the Fifth Circuit, eliminates confusion surrounding the status of harbor workers and furthers the purposes and intent underlying the LHWCA to confine Jones Act coverage to members of a crew of a vessel. Additionally, this status rule, when considered with the principles enunciated in Wilander, includes all employees permanently aboard a vessel and accounts for the technology of special purpose oil field vessels engaged in operations on navigable waters.

LHWCA coverage operates differently in the oil field and in the harbor. These distinct circumstances have confounded the formulation of a general seaman status test

5. 812 F.2d 977 at 983.
6. 111 S.Ct. 807 (1991).

which effectuates the Congressionally intended interaction among the Jones Act, the LHWCA and the Outer Continental Shelf Lands Act (OCSLA),[7] which applies the LHWCA to workers on fixed platforms or other structures on the outer Continental Shelf. Considering the legislative development of the Jones Act, the LHWCA and the OCSLA in context, the Pizzitolo/Wilander rule is a valid and reliable seaman status test which adheres to the statutory boundaries intended by Congress.

The principles enunciated by the Ninth Circuit in its decision below and in its earlier decision in Wenzel v. Seaward Marine Services, Inc.,[8] contravene the legislative history and development of the Jones Act and the LHWCA by including land-based maritime workers and harbor workers within the class of Jones Act seamen.

These maritime employers urge reversal of the Ninth Circuit and the adoption of a Pizzitolo status rule.

7. 43 U.S.C. § 1333(b).
8. 709 F.2d 1326 (9th Cir. 1983).

ARGUMENT

I. The Ninth Circuit Opinion Contradicts the Recent Unanimous Decision in *McDermott International, Inc. v. Wilander*.

The recent decision of this Court in Wilander[9] resolved the longstanding conflict between the Fifth Circuit,[10] on the

9. 111 S.Ct. 807 (1991).

10. The Fifth Circuit first synthesized its seaman status test in Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). Twenty-six years later, a divided Fifth Circuit sat *en banc* and reaffirmed its Robison test with some modifications in Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (*en banc*). The Fifth Circuit's Robison seaman status test states:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779.

one hand, and the Third[11] and Seventh[12] Circuits, on the other hand, with respect to the legal standard for determining Jones Act[13] seaman status. The Wilander decision expressly approved the second prong of the Fifth Circuit's seaman status test formulated in Offshore Company v. Robison,[14] which confers seaman status on all workers who are more or less permanently assigned to a vessel or who perform a substantial portion of their work aboard a vessel and whose duties contribute to the function or mission of the

11. The Third Circuit had followed the more traditional tripartite seaman status test originally enunciated by the First Circuit in Carumbo v. Cape Cod S.S. Co., 123 F.2d 991, 995 (1st Cir. 1941). That test requires "that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation." *Id.* at 995

12. The Seventh Circuit had formulated its seaman status test in Johnson v. John F. Beasley Construction Co., 742 F.2d 1054, 1061 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

13. The Jones Act, 46 U.S.C. § 688(a), in pertinent part provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . (1982)

14. 266 F.2d 769, 779 (5th Cir. 1959)

vessel.[15] In so doing, Wilander rejected the notion that a maritime worker must "aid in the navigation of the vessel" in order to attain Jones Act seaman status.

The Wilander decision rests on the developmental chronology of the Jones Act, passed in 1920, and the Longshore Act[16] as a compensation scheme for harbor workers passed in 1927, to eliminate Jones Act benefits to land-based maritime workers and harbor workers, and to substitute a compensation remedy for those workers.[17] In Wilander the court recalled the incorrect supposition made in Haverty[18] that Congress would not willingly "have allowed the protection to men engaged in the same maritime duties to vary with the accident of their being employed by a land-based stevedore rather than by the ship."[19] But as Wilander observed, "Congress would, and did [distinguish the

15. *Id.* at 779. *See supra*, note 10.
16. 33 U.S.C. §§ 901-950 (1988).
17. Messrs. Engerrand and Bale, Seaman Status Reconsidered, 24 S.Tex.. L.J. 431 (1983).
18. International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926).
19. *Id.* at 52. *See* Bull, Seaman Status Applied: A Practical Guide To Status Determination, 1 U.S.F. Maritime Law Journal, 43 (1989).

protection provided to maritime workers based upon whether the worker was employed by the ship or by a stevedore in the LHWCA]."[20]

Wilander establishes that the LHWCA and the Jones Act are mutually exclusive statutes.[21] In fact, the court there observed that:

> [I]t is odd but true that the key requirement for Jones Act coverage now appears in another statute [referring to "master or member of a crew of any vessel" in 33 U.S.C. 902(3)(G)].[22]

Consequently, under the principles enunciated in Wilander, no land-based workers are "seamen."[23] Wilander also makes clear that "with the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."[24]

20. Wilander, 111 S.Ct. at 813.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

Wilander sets out an important guideline for determining the proper legal standard for seaman status under the Jones Act -- whether the maritime worker is land-based or sea-based. This pivotal factor of whether the worker is land-based or sea-based is derived from an analysis of the history of the statutory interplay between the Jones Act and the LHWCA which delineated Jones Act seaman status.[25] To rule that a land-based ship repairman may be a Jones Act seaman is in direct conflict with the principles established in Wilander.

The Wilander decision is rooted in the historical development of the law of seamen, especially in the context of

25. The LHWCA covers maritime workers, and at § 902(3), defines maritime "employee" as

> When used in this chapter --
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> * * *
>
> (G) a master or member of a crew of any vessel.

the longstanding competing forces between the congressional enactments of the Jones Act and the LHWCA and the court decisions interpreting those acts. The legislative history of the enactment and subsequent amendments to the LHWCA and the Jones Act span most of this century. When considering the issues of this statutory interface, as was done in Wilander, the court should effectuate the express language of the coverage provisions of the LHWCA within the context of its entire legislative history.

II. The Ninth Circuit Decision Conflicts with Most Harbor-Based Jones Act/LHWCA Decisions.

The Ninth Circuit decision should be reversed as contrary to authoritative maritime jurisprudence. Not only does the appellate opinion below contradict the recent decision in Wilander,[26] but both the result and the analysis employed by the Ninth Circuit also conflict with the great weight of jurisprudence denying seaman status to land-based

26. 111 S.Ct. 807 (1991).

employees, harbor workers and ship repairmen,[27] and restricting Jones Act coverage to members of the crew of a vessel who have more or less permanent attachment to that

27. For example, Sharp v. Wausau Insurance Companies, 917 F.2d 885 (5th Cir. 1990) (welder/piledriver who lived ashore engaged in rebuilding a train bridge over Lake Pontchartrain); Williams v. Weber Management Services, Inc., 839 F.2d 1039 (5th Cir. 1987) (repairman, hired from a pool of temporary workers, to repair the drum and brake assembly of a crane on a moored barge and to hose off its deck); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988) (electrician employed by operator of a coal terminal and dock on the Mississippi River who lived on shore and worked out of a shore-based electrical shop maintaining and repairing both shore-based machinery and electrical equipment on vessels owned by his employer); *see also*, Balfer v. Mayronne Mud & Chemical Company, 762 F.2d 432, 434 (5th Cir. 1985); Buras v. Commercial Testing & Eng'g Co., 736 F.2d 307 (5th Cir. 1984; White v. Valley Line Co., 736 F.2d 304 (5th Cir. 1984); Jones v. Mississippi River Grain Elevator Co., 703 F.2d 108 (5th Cir.), *cert. denied*, 464 U.S. 856, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983); Bouvier v. Krenz, 702 F.2d 89, 90 (5th Cir. 1983); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349 (5th Cir. 1983); Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir.), *cert. denied*, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981); Cox v. Otis Engineering Corp., 474 F.2d 613 (5th Cir. 1973); Thomas v. Peterson Marine Serv., 411 F.2d 592 (5th Cir. 1969), *cert. denied*, 396 U.S. 1006, 90 S.Ct. 562, 24 L.Ed.2d 499 (1970); Rotolo v. Halliburton Co., 317 F.2d 9 (5th Cir.), *cert. denied*, 375 U.S. 852, 84 S.Ct. 111; 11 L.Ed.2d 79 (1963).

vessel or a fleet of vessels.[28] The Ninth Circuit opinion also ignores the principles that Jones Act status be determined in the context of the worker's entire employment with his current employer or in view of the nature and location of his work as a whole.[29]

28. Many maritime employees with undisputed maritime duties or navigational functions are not Jones Act seamen because they are not members of the crew of a vessel and they have no permanent attachment to a vessel or identifiable fleet of vessels. Bach v. Trident Steamship Co., Inc., 920 F.2d 322, 324-26 (5th Cir. 1991) (compulsory river pilot who was engaged to pilot an oceangoing vessel through a section of the Mississippi River between New Orleans and Pilottown); Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991) (a wireline operator employed by an oilfield service company who performed wireline services for operators of various oil production facilities both onshore and in state and federal waters); Ketnor v. Automatic Power, Inc., 850 F.2d 236, 237-38 (5th Cir. 1988) (a service technician employed to check and repair lights and horns on oil and gas wells in state territorial waters and in the Gulf of Mexico); Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1068-1069 (5th Cir. 1986) (*en banc*) (welder's helper engaged in maintenance and repair work to offshore platforms and fixed structures in the Gulf of Mexico who was quartered on a fixed platform called "Mike's Structure").

29. *See also* Prinzi v. Keydril Co., 738 F.2d 707, 711 (5th Cir. 1984); White v. Valley Line Co., 736 F.2d 304, 306 (5th Cir. 1984); Wallace v. Oceaneering International, 727 F.2d 427, 432 (5th Cir. 1984); Buras v. Commercial Testing & Engineering Co., 736 F.2d 307, 311 (5th Cir. 1984; Bouvier v. Krenz, 702 F.2d 89, 90 (5th Cir. 1983); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1347 (5th Cir. 1980); Brown v. ITT Rayonier, Inc., 497 F.2d 234 (5th Cir. 1974).

III. The Ninth Circuit Decision Conflicts with the Statutory Language and the Legislative Development of the Jones Act and the LHWCA.

The decision of the Ninth Circuit should be reversed as contradictory to the statutory interface between the LHWCA and the Jones Act. The finding by the Ninth Circuit that Gizoni may be a Jones Act seaman contradicts the express language of the LHWCA coverage definition which includes "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ."[30]

Both the result and the analysis followed by the Ninth Circuit opinion contravene the legislative development of the Jones Act, and the LHWCA. An authoritative study of the legislative and jurisprudential development of the Jones Act and the LHWCA is set out by Messrs. Engerrand and Bale, Seaman Status Reconsidered, 24 S.Tex. L.J. 431 (1983). *See also,* Seaman Status Reconstructed, 32 S.Tex.L.R. ___ (1991).

30. 33 U.S.C. § 902(3)(G).

While Congress was developing the LHWCA in 1926, the Supreme Court held that the term "seaman" as used in the Jones Act included a longshoreman employed on navigable waters who sued his stevedore employer for the negligence of a co-employee.[31] Determined to grant land-based maritime workers similar remedies as other land-based workers, Congress passed the LHWCA within six months of the Haverty decision, which also excluded land-based workers from Jones Act coverage.

The LHWCA provided a compensation remedy for all maritime workers injured on navigable waters, but expressly excluded "a master or member of a crew of any vessel."[32] Thus, passage of the LHWCA in 1927 legislatively amended

31. Haverty, 272 U.S. 50, 52 (1926).
32. 33 U.S.C. § 902(3)(G) and § 903(a).

the Jones Act and restricted the class of Jones Act seamen to "masters or members of a crew of a vessel."[33]

Despite this legislative removal of land-based harbor workers and longshoremen from the Jones Act, the courts continued to expansively define the term "seaman." Again, in Seas Shipping Co. v. Sieracki,[34] this Court held that a longshoreman was a "seaman" and as such entitled to the warranty of seaworthiness. Still determined to treat harbor workers the same as other land-based workers, the next LHWCA amendment in 1972 expressly eliminated this

33. Wilander, 111 S.Ct. at 813. This result had been declared previously by the Supreme Court in three earlier decisions, South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940); Swanson v. Marra Bros., 328 U.S. 1, 5 (1946); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957), and has been reiterated in a string of Fifth Circuit decisions, Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 981 (5th Cir. 1988), *cert. denied*, 108 S.Ct. 1013 (1988); Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1070 (5th Cir. 1986) (*en banc*); Munguia v. Chevron Company, U.S.A., 768 F.2d 649, 654 (5th Cir. 1985); Bouvier v. Krenz, 702 F.2d 89, 91 (5th Cir. 1983); Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452, n.2 (5th Cir. 1980); Brown v. ITT Rayonier, Inc., 497 F.2d 234, 236 (5th Cir. 1974); Burns v. Anchor-Wate Co., 469 F.2d 730, 732 (5th Cir. 1972); Barrios v. Louisiana Constr. Materials Co., 465 F.2d 1157, 1161 n. 3 (5th Cir. 1972); McKie v. Diamond Marine Co., 204 F.2d 132, 135-36 (5th Cir. 1953).

34. 328 U.S. 85, 99 (1946)

unseaworthiness action for longshoremen and substituted a negligence action similar to that available to other land-based workers.

The Ninth Circuit decision flies in the face of this repeatedly expressed Congressional determination to treat ship repairmen similarly to other land-based workers.

IV. The Pizzitolo Rule Eliminates Much of the Confusion Created by the Application of Seaman Status Tests in the Harbor and Accurately Delineates the Statutory Interface Between the Jones Act and the LHWCA.

In 1987, the confusion generated by applying seaman status tests to longshoremen and harbor workers was substantially eliminated by the Fifth Circuit in Pizzitolo v. Electro-Coal Transfer Corp.[35]

The area of land-based maritime workers in and around the harbor and in the shipyard, which is the battleground in both Pizzitolo and Gizoni, has generated the most confusion in Jones Act seaman status decisions. Under the Fifth Circuit test, confusion resulted because the first two

35. 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988) [hereinafter "Pizzitolo"].

prongs of the Robison seaman status test: "permanent assignment" and "substantial work on board a vessel" are alternative; and hence, ostensibly, all longshoremen and harbor workers satisfy the Robison seaman status test, because they perform:

> A substantial portion of their work on a vessel;
>
> and,
>
> Their duties contribute to the function or mission of the vessel or its operation and welfare in maintenance during movement or anchorage for future trips.

The application of the Robison seaman status test to a land-based harbor worker confers seaman status on every longshoreman who performs substantial work on vessels. The confusion generated by this over-expansive definition applied by jurors not versed in the distinction between longshoremen and seamen, further expanded seaman status to cover just about any worker injured on a vessel (or floating structure) and encouraged appellate resolution of every seaman status determination.

In order to include all members of the crew of the vessel, the courts had gradually expanded the traditional navigational-function test in its application. In the Fifth Circuit, Judge Wisdom crafted the Robison test for Jones Act seaman status in Offshore Co. v. Robison,[36] under which Jones Act seaman status was no longer limited to members of the crew of the vessel or the "ship's company," because a more or less permanent assignment was no longer required for crew member status. A worker now satisfied the vessel-attachment requirement by simply performing "a substantial part of his work on the vessel." *Id.* at 779.

In 1986, some uncertainties were reduced in Barrett v. Chevron U.S.A.,[37] when the seaman status test for amphibious oil field workers who claim their seaman status under the "substantial work" prong of the Robison test was required to be "in the context of his entire employment with his current employer." Additionally, those workers who did not perform "traditional seaman's duties" must have

36. 266 F.2d 769, 779 (5th Cir. 1959).
37. 781 F.2d 1067 (5th Cir. 1986) (*en banc*).

performed their duties on a "fleet of vessels."[38] Even with this restriction on the Robison test, traditional longshoremen and land-based ship repairmen and harbor workers such as Gizoni, Wenzel, Simko, Johnson and Pizzitolo satisfied the Robison/Barrett test wherever they worked on an identifiable group of vessels.

Barrett did not solve the confusion surrounding workers, land-based workers or harbor workers, who performed their duties on and about vessels which form a fleet. However, Pizzitolo has since solved that problem within the Fifth Circuit.

Pizzitolo

In 1987, Judge Davis (who authored the majority opinion in Barrett), substantially eliminated the confusion generated by application of the Robison seaman status test to longshoremen and harbor workers in Pizzitolo.[39]

38. 781 F.2d at 1074.

39. 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988).

Pizzitolo was employed as an electrician by Electro-Coal, the owner and operator of a coal terminal and dock on the Mississippi River. Electro-Coal routinely transfers coal from vessel to vessel and vessel to shoreside storage areas. Pizzitolo worked a standard forty-hour work week and arrived for work each morning at the shore-based electrical shop where he received assignments from a foreman. Although 75% of his work time was spent maintaining and repairing shore-based machinery and 25% was spent repairing electrical equipment on the vessels owned by Electro-Coal, when injured, he was repairing one of the conveyors used to load and unload the vessel when he fell into the river.

Pizzitolo filed suit against his employer under the Jones Act and General Maritime Law, and the issue of Jones Act seaman status was submitted to the jury which found seaman status. The district judge disagreed with the jury's finding that Pizzitolo was a seaman and granted a judgment notwithstanding the verdict on the issue of seaman status.

The Fifth Circuit Pizzitolo opinion, like this Court's decision in Wilander, rests on the chronology of statutory development under the Jones Act passed in 1920 and the LHWCA, passed in 1927, to eliminate Jones Act benefits to land-based maritime workers and harbor workers, and to substitute a compensation scheme for those workers. The Pizzitolo decision rests upon the Congressional intent in passing the LHWCA in 1927, following the passage of the Jones Act in 1920, and reiterates that:

> The 1927 LHWCA, in effect, amended the Jones Act to make Jones Act benefits available only to maritime workers not covered by the LHWCA. Harbor workers engaged in occupations such as longshoring, shipbuilding and ship repairing, who were injured on navigable water, were the intended beneficiaries of the 1927 Act. The LHWCA as amended in 1972 expressly covered workmen engaged in these occupations. In 1972, coverage of these workmen's activities was extended beyond navigable water to cover their injuries on adjacent landbased work locations. Given the explicit coverage of workmen engaged in the enumerated occupations, we reject the notion that Congress could have intended to exclude them from the benefits of the LHWCA as members of the crew of a vessel. In sum, we hold that because longshoremen, shipbuilders and ship repairers are engaged in occupations enumerated in the LHWCA, they are unqualifiedly covered by that Act if they

> meet the Act's situs requirements; coverage of these workmen by the LHWCA renders them ineligible for consideration as seamen or members of the crew of a vessel entitled to claim the benefits of the Jones Act.
>
> The only work Pizzitolo performed aboard vessels was electrical repair work. Even if he spent a substantial portion of his work time aboard a recognized fleet of vessels performing electrical repairs, for reasons stated above he is covered by the LHWCA and cannot qualify as a seaman within the meaning of the Jones Act.[40]

Thus, wherever the worker is within an occupation category expressly enumerated in § 902(3) of the LHWCA, he is unqualifiedly covered by the LHWCA if he meets the LHWCA situs requirement [that is, if he was injured on navigable waters or an adjoining area under § 903(a)], and summary judgment dismissing a claim for Jones Act seaman status is appropriate. Where the worker is in an occupation specifically enumerated in the LHWCA, the Robison seaman status test is legally irrelevant.

That is, if the plaintiff in a Jones Act suit is a harbor worker, longshore worker, shipbuilder or ship repairer, Pizzitolo declares that he is no longer entitled to have his

40 Pizzitolo, 812 F.2d at 983.

Jones Act claim considered under the Robison seaman status test of "substantial portion of work aboard a fleet of vessels" and "duties contribute to the function or mission of vessels." Under Pizzitolo, the question of status is analyzed by first determining whether the worker is in one of the statutorily enumerated occupations, and then whether he meets the situs requirement under 33 U.S.C. § 903(a). If both are present, the Jones Act claim will be dismissed as a matter of law without ever reaching the Robison seaman status test.

In the Circuits which had followed the now defunct navigational-function test, confusion still reigned in seaman status cases involving land-based or harbor-based maritime workers because those workers frequently performed some maneuvering functions in connection with vessels or floating structures.[41]

41. *See, e.g.*, Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326, 1327 (9th Cir. 1983) (Diver/tender engaged in underwater ship repairs may have operated a SCAMP, a submerged cleaning and maintenance platform); Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982) (Nightwatchman at sand and gravel business on the bank of the Ohio River filled gas pumps and placed lanterns on moored barges).

For example, Gizoni and Wenzel were both ship repairmen, an occupation enumerated in the LHWCA, and were both injured on navigable water. In the Circuits which followed the navigational function test, both Gizoni and Wenzel may have been found to be seamen. However, under Pizzitolo, both Wenzel and Gizoni meet the LHWCA situs requirement, are covered by the LHWCA, and are ineligible for consideration of seaman status under the Jones Act.[42] In other words, before the Ninth Circuit decision in this case, the Fifth Circuit's Pizzitolo rule had resolved the confusion which had provoked these concerns created by applying seaman status tests to workers like Wenzel and Gizoni. As of 1987, the employee and work situation presented in this case no longer created a problem within the Fifth Circuit, and summary judgment denial of Jones Act status was proper.

V. Seaman Status Should Often be Determined by Summary Judgment and by Directed Verdict.

The indiscriminate application of seaman status tests by jurors to workers who are engaged in those specific

42. Pizzitolo, 812 F.2d at 984.

occupations enumerated in § 902(3) of the LHWCA generates an over-expansive class of Jones Act seamen which includes many land-based ship repairmen, traditional longshoremen, and harbor workers whose only work on vessels is in port. Within the Fifth Circuit, the consistent practice prior to Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980), of submitting every marginal status issue to the jury panel, served to increase confusion in the Jones Act arena, until its zenith when two Jones Act cases decided on substantially identical facts yielded contradictory panel results on seaman status. *See* Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 282 (5th Cir. 1981).

In Wilander, this Court characterized the question of seaman status as a mixed question of law and fact.[43] Wilander declared that "[i]t is for the court to define the statutory standard. 'Member of a crew' and 'seaman' are statutory terms; their interpretation is a question of law."[44] In cases where the underlying facts are established, and the

43. Wilander, at 818. *See* Holland v. Allied Structural Steel Corp., 539 F.2d 476 (5th Cir. 1976); Keener v. Transworld Drilling Co., 468 F.2d 729 (5th Cir. 1972).

44. Wilander, at 818.

rule of law is undisputed, the only issue is whether the facts meet the statutory standard. The Pizzitolo rule as a threshold status issue, can provide an appropriate statutory standard sufficient to support dismissal on summary judgment under Federal Rule of Civil Procedure 56 or its state counterpoint in cases involving workers engaged in the occupations enumerated in the Longshore Act, 33 U.S.C. § 902(3).

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Substantive law identifies which facts are material to the determinative law for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Furthermore, Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the Rule prior to trial, that the claims and defenses have no factual basis. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Given the established legal framework surrounding Jones Act seaman status enunciated in Wilander and Pizzitolo, the factual disputes which are material to the seaman status issue have been significantly reduced, and in many cases, such as this one, the factual disputes are not material to the determining legal issues and seaman status can often be decided as a matter of law either on summary judgment or directed verdict.[45]

45. *See* Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Cir. 1985); Bernard v. Binnings Construction Co., Inc., 741 F.2d (5th Cir. 1984).

Proposed Seaman Status Test

In order to assist the trial court in determining whether or not such claimants are entitled to a jury trial on their alleged Jones Act claims, in answering the question accepted for review in this case, this Court should clearly enunciate a seaman status test. When the Court formulates such a status test, the focus should remain on the language and intent underlying the LHWCA, as in Wilander, and should encompass the entire crew of a vessel but exclude workers who are not part of that ship's regular company.

The simplest and most reliable seaman status test is to require that the worker be more or less permanently assigned to a vessel or a fleet of vessels in navigation and perform the work of such vessel or vessels.[46] Such a seaman status test, after an initial threshold application of the Pizzitolo rule, to eliminate land-based maritime workers and harbor workers, would create an appropriate class of Jones Act seamen consistent with the statutory interface between the Jones Act

46. *See* Wilander, 111 S.Ct. at 817. Such a seaman status formulation was denominated as the "real test" by Judge Skelly Wright in Perez v. Marine Transport Lines, 160 F.Supp. 853 (E.D.La. 1958).

and the LHWCA. This test would eliminate the confusion surrounding land-based workers and would comply with Congressional intent to restrict Jones Act coverage to masters and members of the crew of a vessel.[47]

47. LHWCA, 33 U.S.C. at § 902(3)(G) (1988).

CONCLUSION

The decision of the Ninth Circuit should be reversed and this Court should adopt the Pizzitolo rule as a threshold seaman status test to eliminate land-based maritime workers and harbor workers. Such a rule best conforms to the express statutory language and the Congressional intent underlying the Jones Act and the LHWCA.

Respectfully submitted,

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